Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

OCTOBER TERM, 1993

FRANK BORING FITZGERALD,
Petitioner,

v.

MONTANA DEPARTMENT OF FAMILY SERVICES, et al,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Frank Boring Fitzgerald
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QUESTIONS PRESENTED

1. Whether Petitioner could rely upon a Department of Family Services "Report", and other evidence in support, with which he could: establish a foundation for what his Civil Rights were, thereby his standing; establish violations to his Civil Rights; establish violation of federal laws and the US Constitution in regards his Rights and privileges relative to events reported?

2. Whether Petitioner could rely on tolling of a state tort statute of limitations pending discovery, where discovery was concealed by State secrecy and circumstances, where there had been unsuccessful efforts at discovery, observing federal law or state law to toll?

3. Whether Petitioner could rely upon an exception, contained in state's tort statute of limitations, that of torts founded upon instruments in writing having a longer limitation period?

4. Whether in a series of Civil Rights injury inflictions, federal courts may characterize certain inflictions for accrual purposes negating other later inflictions which could best met the objective threshold test?

5. Whether DFS discriminated applying a "Service Treatment Agreement" to foster care alleged perpetrator instead of to Petitioner.

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OCTOBER TERM, 1993

FRANK BORING FITZGERALD,
Petitioner,

v.

MONTANA DEPARTMENT OF FAMILY SERVICES; ANNABETH FELSMAN; SHIRLEY TIERNAN; PAT CAHIL; RUSS FRANCETICH; WARREN WRIGHT, DFS Regional Administrator; DAMON L. GANNETT, Guardian Ad Litem; CASEY FAMILY PROGRAM, Division of the Casey Foundation; VINCENT MATULE; MIMI MORGAN; PEGGY SMITH O'LEARY; GEORGE BULATOWICZ; KENNETH CURTIS, in his capacity as foster care father,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Ninth Circuit

Frank Boring Fitzgerald, Petitioner, Pro Se, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninith Circuit entered on August 30, 1993 and made final on October 28, 1993 by the denial of a petition for rehearing.

OPINION BELOW

The August 30, 1993 MEMORANDUM (C.A.9 92-35001) of the Court of Appeals is to be found in App. "A", p1-4.

The November 15, 1991 FINAL JUDGMENT (CV 90-69-BLG-JDS) of the US District Court is to be found in App. "B", p5-7.

The October 28, 1993 ORDER (C.A.9 92-35001) denying a petition for rehearing is to be found at App. "C", p8.

The November 9, 1993 Judgment and Mandate (C.A.9 92-35001, CV 90-69-BLG-JDS) is be be found at App. "D", p9.

Other matters Petitioner will reference in his Arguments are also to be found in the Appendices bound in a separate volume.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 1993. A petition for rehearing was denied on October 28, 1993. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner could rely upon a Department of Family Services "Report", and other evidence in support, with which he could: establish a foundation for what his Civil Rights were, thereby his standing; establish violations to his Civil Rights; establish violation of federal laws and the US Constitution in regards his Rights and privileges relative to events reported?

2. Whether Petitioner could rely on tolling of a state tort statute of limitations pending discovery, where discovery was concealed by State secrecy and circumstances, where there had been

unsuccessful efforts at discovery, observing federal law or state law to toll?

3. Whether Petitioner could rely upon an exception, contained in state's tort statute of limitations, that of torts founded upon instruments in writing having a longer limitation period?

4. Whether in a series of Civil Rights injury inflictions, federal courts may characterize certain inflictions for accrual purposes negating other later inflictions which could best met the objective threshold test?

5. Whether DFS discriminated applying a "Service Treatment Agreement" to foster care alleged perpetrator instead of to Petitioner.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[1]

US Constitution, 8th, 9th, 11th, and 14th Amendments

MCA 27-2-101, et seq., state statutes of limitations

USC 42-601, et seq., intent of Congress as to foster care

USC 42-1983, Civil Rights

STATEMENT OF THE CASE

On April 6, 1990, Petitioner herein, relying on USC 42-1983, filed his Civil Rights Complaint in US District Court in Billings, Montana, containing his stated claims against listed defendants therein. The case was assigned No. CV-90-69-BLG.

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1 Pertinent parts are printed in App. "E", p10-15, except those cited verbatum in the Argument.

Petitioner claimed defendants violated his Civil Rights under color of state law which some privileges in similarity are recognized in USC 42-601, et seq as intent of Congress in regards foster care practices and procedures, allegedly not followed; and which some Rights are secured by the US Constitution, allegedly were violated.

Furthermore, the Complaint went to failure of defendants to timely afford Petitioner, in 1987-90, his constitutionally assured Right of procedural and substantive due process in state court before his Civil Rights could be interferred with.

This case went to several defenses on part of defendants therein. Outstanding ones were based upon when did accural begin, when to begin to run a state statute of limitations, and failure then of Petitioner herein to state a claim for which relief could be granted.

In support of defendant's position Petitioner could not state a claim upon which relief could be granted, defendants referred to decisions of state courts dealing with Petitioner and his child, said by defendants to have severed Petitioner's Parental Rights and that his child was said to be in permanent State custody.

Later in the case, US district court adopted the concept of completely severed Parental Rights and permanent State custody attributing these to state district court "Order" of September 1986 which "Order" was said to have been the point, or before, of accrual, and a beginning to run of the 3 year state tort statute of limitations.

During those CV-90-69 proceedings before the bench, sitting without a jury, Petitioner introduced into the record several exhibits, as evidence to establish a foundation for what his Civil Rights were, thereby his standing; to establish violations of his Civil Rights; to establish violation of federal laws and the US Constitution; and to

establish accural, discovery, and timely starting to run of a state tort statute of limitations. Those exhibits were admitted to support his Civil Rights claims against defendants but played no part in this case as regards its outcome.

Of particular interest to presentation of Petitioner's position was the admittance of the Department of Family Services (DFS) "Report" of December 1987-March 1988, located in the Record Exhibits of the US district court file as Exhibit "C"[2], therein. Exhibits "B"[3] and "D"[4] therein supported Exhibit "C".

Also of particular interest to timing question was the September 2, 1986 "Order"[5] of the 13th judicial district state court, mentioned above, which among other things granted the State temporary care and temporary custody of Petitioner's daughter and granted him entitlement to regular visitation without terminated his Parental Rights. That "Order" was legally based on the "Stipulation"[6], an instrument in writing. Affirmed *In Re M.G.M.*, 741 P2 770 (1987), app den US Sup Ct docket 87-1582 (1988).

The US court rendered dismissal of the claims against the State and its actors under Fed.R.Civ.P. 12(b)(6) with the remainder given summary judgment under Rules 54(b) and 58. The lateness of filing the Civil Rights Complaint was said to form basis for dismissal.

Petitioner timely appealed to the US Court of Appeals for the Ninth Circuit from the district court's Final Judgment of November 15, 1991 dismissing all of the defendents therein listed. The appeal

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2 Exhibit "C", the DFS "Report", is found here in App."F".
3 Exhibit "B", Phillips "Statement", is found here in App. "G".
4 Exhibit "D", "note" by M.G.M., is found here in App. "H".
5 That "Order" can be found here as App. "I".
6 The "Stipulation" found here as App. "J".

was assigned No. 92-35001.

On appeal, the matter of the DFS "Report" and its supporting evidence were again side-stepped in favor of the September 2, 1986 "Order" of state court said to form the beginning to run of a 3 year state tort statute of limitations.

The Ninth Circuit affirmed the US district court on August 30, 1993 with rehearing denied October 28, 1993.

GENERAL ARGUMENT

> "Focus of 1983 is on misuse of power possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law." Johnston v. Lucas, 786 F2 1254 (1986, CA5 Miss)
>
> "{Civil Rights} Statute's primary purpose is preservation of human liberty and human rights." Davey v. Tomlinson, 627 FS 1458 (1986 ED Mich) {ins add}

In this Civil Rights case, harmful events of the first foster care, App. p39, 40, 41, and wrongful conditioning (followed by "grooming", App. p17, 25) of the second, which heavily contributed to final physical custody arrangements as to Petitioner's child in the September 1986 "Order", were absolutely concealed from Petitioner who was prevented from making the connections until discovery of the first foster care harm a year later in the Phillips Notarized "Statement".

Harmful events of the second foster care were discovered in the official DFS "Report" after system secrecy was lifted because of **Fitzgerald v. State of Montana, et al**, DV-88-727{726} (1988). Fitzgerald therein is Petitioner herein. In *Fitzgerald*, State district court refused to mandate a removal of Petitioner's daughter from harm in the second foster care.

This Civil Rights violation case is evidence based: 2 instruments in writing, one of which was generated by the State; a state court order; and a set of evidentiary documents, one of which was generated by the State. The State-generated instrument and document contains evidence of elements of tortious conduct on part of defendants setting the stage for Petitioner's claim of violation of his Civil Rights.

But the DFS "Report", the Phillips Notarized "Statement" and the M.G.M. "note" were ignored, by federal courts below. Only the state court "Order" played any part in this federal Civil Rights case and it was misread which is proved in Arguments below.

Argument as to Question 1.

Whether Petitioner could rely upon a Department of Family Services "Report", and other evidence in support, with which he could: establish a foundation for what his Civil Rights were, thereby his standing; establish violations to his Civil Rights; establish violation of federal laws and the US Constitution in regards his Rights and privileges relative to events reported?

A.

By its "Order" of September 2, 1986, App. p49 at par. 3 and 5, respecting and legally enforcing agreements in the "Stipulation", App. p51, as the will of the court, it created the Right of regular visitation and also created the corresponding duty of implementation which was wrongfully violated by knowledgeable defendants; a tortious inaction:

"To give rise to an action in 'tort' the right violated must have been created and corresponding duty must have been imposed by law." "Donovan v. Kansas City, 175 SW2 874, 882 (1943). Also see Stimson v. Michigan Bell Tel. Co., 258 NW2 227, 231

(1977); Johnson v. Johnson, La.App., 171 S2 710, 712 (1965); Parsons v. Foshee, 55 SE2 386, 388 (1949)."

Petitioner argues he was not terminated of: his Parental Rights, App. p49 par. 3; his Right to know, App. p16, 20, 34; his Right to be present when his child underwent surgery, a separate court order; by that separate order, his Right to know private matters relative to that surgery; his parent-child relationship, related to Parental Rights; his being entitled to regular visitation, App. p49 par. 5; his familial association; his Right to have his child protected while in temporary (see App. p49 par. 4) State custody.

B.

Essential elements of proof of Rights, certain, retained in Petitioner, beyond proof of Rights granted by and not terminated by the September 1986 "Order" (see App. p49 at par. 3, 4, 5), was contained in the DFS "Report (see App. p16, 20, 22, 23, 27, 34).

Petitioner was not terminated of his Rights and was not seeking in his Civil Rights Complaint physical custody of his child as injunctive relief although that was a possibility at that moment. (In 65 days she would have been 18.)

For relief based upon Complaint's claims, he was seeking vindication of his Civil Rights, deterrance, and compensatory damages for violations of those Rights. If only some Civil Rights are infringed by due process that leaves all of the remander intact, which were extra-due-process infringed. Due process is not an inconsequential constitutional Right.

The DFS "Report", confirming in part his stated claims, alludes to an incident, and, the way State actors handled it in the aftermath. Also, those case historical developments had a tragic impact upon Petitioner's parent-child relationship and familial association, App.

28. The incident and the aftermath, reported in the DFS "Report", were torts of extreme and outrageous conduct. The incident, and the way it was handled, were "crimes against humanity", pooh-poohed by prosecutors, the Governor, and state court. It, and the aftermath that followed in 1987-88-89-90 violated his Civil Rights, tortiously interferred with court ordered regular visitation and thereby familial association.

> "Gist of 'tort of extreme and outrageous conduct' is intentional infliction of emotional distress on another by conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized community; it is conduct so extreme as to exceed any reasonable limit of social tolerance." Hester v. Barnett, Mo.App., 723 SW2 544, 560 (1987).

That 1986 court "Order" legalized a contractual agreement amongst the parties as a temporary settlement of the then State case based upon the "Stipulation".

Casey and the Guardian Ad Litem by court "Order", App. p49, par. 5 were to arrange for regular visitation which was interferred with. Petitioner's child was to remain placed in presumably a loving caring foster care home which it turns out was not; not then nor later. A second State foster care bad faith choice. Petitioner, by means of the "Stipulation" and the court "Order", had an agreement with the parties. Any violation of that agreement was intentional (intent can be derived from conduct), the foster care "Service Treatment Agreement" (foster care "STA") App. p35-36, was an improper means (conduct) to an end, and amounted to tortious interference with contracted (agreed upon in the "Stipulation") relations and resulted in forever damages:

> "Elements of claim for 'tortious interference with contracted relations' or business expectancy are: existence of valid contractual relationship or business expectancy; that defendant(s) had knowledge of that relationship; intentional interference inducing or causing breach or termination of relationship or expectancy; that defendants interferred for improper purposes or used improper means and resultant damages." Commodore v. University Mechanical Contractors, Inc., 839 P2 314, 322 (1992). (ins add)

Petitioner will not be able to pass on to his child his life's works nor to his grandchildren as a direct result of foster care harmful conditioning (brain-washing) of his child.

In that "Report", DFS staff logged their concerns, among other things, as to whether or not to inform Petitioner of that incident. There was discussion among DFS staff and the Guardian Ad Litem and with DFS Attorneys on the subject of Petitioner's Rights. His Parental Rights and Right to know were agreed to have remained intact, although Casey disagreed, App. p26, 27. Certain of defendants were fully aware of Petitioner's Rights yet filed responses and motions and US district court and court of appeals accepted their plea as if Petitioner's Rights did not exist.

C.

It is no longer necessary to discover intended, or even unintended, state action in ostensibly private harmful foster care conduct in order to prosecute such outrageous private and governmental conduct, and intent may be inferred from conduct, as violative of Petitioner's Civil Rights. [Meaning derived from *Brown v. Board of Education* (1954) and other Civil Rights cases which followed on the subject of due process and equal protection of the law directed in the 14th Amendment not solely to the states,

reversing *Slaughterhouse* (1873). *Encyclopedia of the American Constitution,* Vol. 1 1986, p273-280, *"Civil Rights".*] The two are intimately tied together, in this case, **under blanket of the September 2, 1986 "Order" and the "Stipulation" the "Order" was founded upon**.

D.

In early 1988, Petitioner was formally and officially notified by DFS staff both verbally, App. p28, and in writing of the sexual assault (a crime in Montana) incident to have happened to his child while in foster care. (This was logged into the DFS "Report" and is a very important document not to be discarded lightly. Because US district court lacked concern for and consideration of that "Report", it amounting to suppression of the "Report", Petitioner was unable to properly prosecute the case.) His child, on February 17, 1988, wrote to him (and his wife, her godmother as well as stepmother), saying it was none of his business, it was all their fault, and in effect, get lost. Then she wrote as a 7 year old instead of as a 15 year old going on 16. Foster care abuse and neglect was the generating factor for the child's reaction to her real family.

So tragic was the incident and its aftermath of foster care, the second foster care abuse and neglect to happen, it completely destroyed his parent-child relationship the September 1986 "Order" of the court could not possibly have done. Petitioner's Rights were effectively terminated absent procedural and substantive due process.

No greater insult and injury to pride and family has ever happened to Petitioner than for <u>two</u> harmful foster care case historical developments to succeed in destroying his family, the first

one of which he did not know of as it happened, nor to have affected our hearts and minds in a way unlikely ever to be undone.

E.

Petitioner argues, the DFS "Report" confirmed the criminal incident, and confirmed the DFS engaged in an illegal foster care "Service Treatment Agreement", hereinafter foster care "STA", App. p35-36 instead of criminal prosecution. In 1987-88, the DFS had duty to protect Petitioner's child from abuse in the Curtis foster care home. The DFS "Report" refers to attempts at protection and refers to interferrence to that protection. App. p17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 36.

Under intent of Congress in USC 42-671(9)[1988], it was the duty and responsibility of DFS then to bring foster care abuse and neglect to the attention of the 13th state district court who had jurisdiction, as the appropriate court until the child turned 18, App. p48-49. That was not done. Jurisdiction, both as to its "Order" and the "Stipulation" the "Order" was legally based upon, and, over the parties to that "Stipulation". {Section 671(9) was amended in 1990, USC sup II to 1988 edition. Since Novmeber 1990, the DFS only is required to report to itself or to an official higher up in DFS. See DFS "Report" for just such an inhouse written report in 1988, App. p33-34. This was in lieu of required directly reporting to the court.} After a reasonable time of State failure to bring the incident to the attention of the court, or to prosecute Petitioner filed *Fitzgerald v. State, supra* in state district court. {He felt it was a father's duty to protect his child, failing this due to color of state law in state court relying on state statutes, he later felt it was proper to file a Civil Rights action in federal court under 1983.}

State had the duty under the 14th Amendment to obey the 8th and 9th Amendments as regards cruel and unusual punishment of the child in a setting of Rights of the child. [Goes to matter of harm while in involuntary confinement.]

The State also had duty under state statutes to provide protection to children in families where parents are alleged to be abusive and neglectful without distinction as to real families or foster care families.

F.

Petitioner argues, what damage sustained to his child's Civil Rights in the Curtis foster care also happened to his Civil Rights. Throughout history, it has been well established if the child suffers, its parents, possessed of their humanity, as we, also suffer. That is why there is a 1983. Meaning derived from quote from *Davey v. Tomlinson, supra.*

G.

On the question of extraneous matter referenced by the US district court to arrive at its decisions, the court erred in reading into that September 1986 "Order" as fact that which were conspicous misreadings, especially in light of other conclusive evidence noted in the DFS "report" and its supports.

H.

A reading of that "Order", **and the DFS "Report"**, clearly points to errors and is argued here, comparing the quotes of the court with actual readings of the documents will show the errors:

a) US district court said in its order, "...any possible cause of action in this case accrued before September 1986 when the (state) district court made the final determination of (M.G.M.'s) proper custody arrangement. **It was at this point in the pro-**

ceedings that defendant Gannett had completed his representations to the (state) district court with regard to M.G.M." Memorandum Opinion and "Order", January 10, 1991, (item #49 on the docketing sheet) at p4-5. Ins and emp add

Error. The DFS "Report" has copies of correspondence to Gannett as well as log entries of phone calls to him as "Guardian Ad Litem", App. p20, 21, 23, 26, 28, 30, 34. From a reading of the DFS "Report", Gannett clearly was in the picture as late as December 1987-March 1988. In addition, the 13th judicial state district court had state jurisdiction until the child reached 18, App. p48-49, hence, Gannett had not completed his representations to the state district court with issuance of the September 2, 1986 "Order" of that court.

b) US district court went on to say at p5,

"...it was at this time that plaintiff's parental relation with his daughter was completely severed." emp add

Error. From a reading of the September 2, 1986 "Order" of state district court, at "CONCLUSIONS OF LAW", it is clear Petitioner's parental relation with his daughter was not completely severed as stated by US district court. Here is what the state district court "Order" actually said, see App. p49:

"3. Rather than proceeding to trial on the Petition to Terminate the Respondent's parental rights, the parties entered into a written "Stipulation" to provide for (M.G.M.'s) custody..."

"4. It is in (M.G.M.'s) best interests that she be placed in the temporary care, custody, and control of the Montana Department of Social and Rehabilitation Services..." {Now called Department of Family Services, DFS.}

"5. Frank Fitzgerald (Petitioner) shall be entitled to regular visitation with (M.G.M.), and plans for these visitations shall be arranged through the guardian ad litem, the Casey Family Program..." ins and emp add

c). US district court said, at p3:

"...**The book, entitled 'Adversarial Proceedings', is clear evidence that plaintiff (Petitioner) was aware of any purported injury inflicted upon him by defendant Gannett long before April of 1987. Therefore, this cause of action accurued well before the statute of limitations cutoff on April 6, 1987.**" ins and emp add

Error. Not all injuries inflicted upon Petitioner by defendant Gannett, or any of the other defendants for that matter, were adequately made known to Petitioner at the time of infliction only much later. And in fact, certain inflictions, actually did not take place until over a year after the September 1986 "Order". Such as the failure to implement court ordered regular visitation. Such as the foster care sexual assault, App. p18, 19, 25, 28, 30, 31, 32, 33, and foster care "STA", App. p35-36, reported in the DFS "Report".

Argument as to Question 2

Whether Petitioner could rely on tolling of a state tort statute of limitations pending discovery, where discovery was concealed by State secrecy and circumstances, where there had been unsuccessful efforts at discovery, observing federal law or state law to toll?

A.

In the matter of a period of limitations in which to bring a Civil Rights action into US district court. Appellate court stated in its Memorandum of August 30, 1993, see App. p3:

"...The district court granted Gannett's motion for summary judgment, ruling that {Petitioner herein} Fitzgerald's claims against Gannett were barred by the statute of limitation. Action under 42 USC 1983 are governed by the state statute of limitations applicable to personal injury tort actions...MCA 27-2-204 set a 3 year statute of limitation for personal injury tort actions. **In Montana, the statute of limitations begins to run on the date of injury regardless of whether the plaintiff knew of the**

cause-of-action or its accrual. MCA 27-2-102(2); Bennett v. Dow Chemical Co., 713 P2 992, 994 (Mont.1986)." ins and emp add

In *Bennett*, the Montana Supreme Court begins with recitation on the general rule of when limitations period begins. However, what the Montana Supreme Court said in the next few paragraphs is of paramount importance and should be considered governing as applied to this case:

"However, the application of the general rule becomes difficult where the injured person is prevented from knowing of his injury by concealment or other circumstances. In such cases, we have recognized certain exceptions which toll the running of the statute until the discovery is discovered. See Monroe v. Harper (1974) 518 P2 788"

".....prevented from knowing.....by concealment or other circumstances." is the key here. The phase, **whether the plaintiff knew of the cause-of-action or its accrual**, used by appellate court, above, was intended in state statute not to involve concealment or other circumstances because the statutes do have a section on concealment, see App. p11 at 27-2-102(3)(a). Petitioner has maintained he was prevented from knowing of the expanse of injuries to his Civil Rights through State secrecy and adherence to it by defendants under color of state law. A demand for production of documents earlier on was denied, twice. The DFS "Report" was released to him by the State's attorney in *Fitzgerald v. State, supra*.

Continuing from *Bennett*:

"In Grey v. Silver Bow County (1967) 425 P2 819, we extended application of this 'discovery rule' in a malpractice action to a situation where the plaintiff was unable to discover his injury until his cast was removed. We tolled the statute until the injury was discovered, thereby delaying the running of the period by 57 days. Also in *Grey*...at 821, we announced the equitable limita-

tion of the discovery rule of giving full scope to the statute of limitations on the one hand and according a reasonable measure of justice to the plaintiff on the other. The federal district court in Billings took this lead from *Grey* and, after considering the equities, applied the discovery doctrine in a products liability action to toll the statute of limitations until the plaintiff discovered that his cataracts may have been caused by the drug MER/29. Hornung v. Richardson Merrill, in [1979] 317 FS 183. Hornung, then, stands for the idea that a statute of limitations can be tolled until the plaintiff discovers the legal causes of his injury if equity so dictates. However, in 1980, the federal district court in Butte specifically refused to require discovery of the legal cause of an injury to initiate the running of a statute of limitations. Much v. Strum, Ruger & Co., Inc., [1980] 502 FS 743, 745. *Hornung* therefor marks the farthest reaches of discovery in Montana."

"As such there is no Montana precedent for utilizing discovery doctrine to toll the statute of limitations beyond discovery of the cause of the injury." emp add

B.

It is settled, because the Civil Rights Act does not contain a statute of limitations, federal courts have relied on state statute of limitations on torts as the governing period of limitation.

When the period of the limitation begins is not up to state statutes as controlling but up to federal law in US district courts, see Briley v. State of California, 564 F2 849, 855 (1977 CA9):

"...while state law controls in determining the applicable limitations period, federal law determines when the limitations period begins to run." with cites[7]

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7 Cox v. Stanton, 529 F2 47, 50 (1975 CA4); Martin v. Merola, 532 F2 191, 195 n7 (1976 CA2); Kaiser v. Cahn, 510 F2 282, 285 (1974 CA2); see Rawlings v. Ray, 312 US 96, 98 (1941); Hilton v. Mumaw, 522 F2 588, 601-02 (1975 CA9); United California Bank v. Salik, 481 F2 1012, 1014 n7 (1973 CA9), Cert den, 414 US 1004 (1973); Moviecolor Ltd. v. Eastman Kodak Co., 288 F2 80, 83-84 (1961 CA2), Cert den, 368 US 821 (1961).

"Thus a borrowed state statute of limitation may be tolled in conformity with federal doctrine where the right [sought to be vindicated] is a creature of federal statutes..." "*Kaiser, Supra* at 287, see Holmberg v. Armbrecht, 327 US 392, 395-98 (1946), *Moviecolor Ltd., Supra* at 82-83." Ins orig.

The right(s) and privileges to be vindicated in US district court are Petitioner's Civil Rights which Civil Rights, by definition are creatures of the US Constitution, federal courts common law, federal Civil Rights Act and USC 42-601 et seq, as to privileges. In addition, his fundamental Human Rights of Parental Rights were not terminated only modified under due process in the September 2, 1986 state district court "Order" by which he was granted entitlement of regular visitation. Not only were these right(s) and privileges to be vindicated in this case but to be shown to have been violated based upon discovery later than the date of the "Order" when he discovered injury.

"The established rule, which we apply in this case (*Briley, Supra*), is that, where plaintiff has been injured by fraud or concealment and remains in ignorance of it without any fault or want of diligence on his part, the statutory period does not begin to run until discovery of the injury." "*Holmberg, Supra* at 397; *Hilton, Supra* at 602; *Kaiser, Supra* at 287; *United California Bank, Supra* at 1014 n7." Ins emp add.

"In light of the prevailing federal doctrine as to fraud and concealment, we feel that the broad remedial policies of the Civil Rights Act are best served by holding that the California limitations period did not commence until Briley discovered the fraud, or could have done so in the exercise of reasonable diligence." Footnote 7 was applied at this point.

"n7 Indeed, it was a concern for the remedial nature of (Section) 1983 and the important constitutional rights it sought to protect that led us originally to adopt the 3 year limitation (from cited California codes)..." With cites. ins add

C.

Since when to apply a state limitation is a federal question,

> "Principles of equitable tolling enunciated throughout federal law." Anixter v. Home-Stake Production Co., 977 F2, 1549, 1551 (1993 CA11). With cites going back to Bailey v. Glover, 88 US 342 (1875).

and, also in *Holmberg, supra*, at 397, the Court listed cases going back to *Bailey* (1875), Petitioner relies on MCA 27-2-102 statutes of limitations, App. p11, to justify his argument, in support of this Petition, appellate court overlooked or misapprehended material points of state law on time limitations contained in MCA.

MCA statutes of limitations should be read as to its object and policy when analyzing its application to this case. Recently, this Court said:

> "Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy". With cites. "Statutory construction 'is a holistic endeavor' and, at a minimum, must account for a statute's full test, language as well as punctuation, structure, and subject matter." U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc., 113 S.Ct. 2173, 2182 (1993).

The phrase in 27-2-102(1)(a), "a claim or cause of action accrues when all elements of the claim or cause exist or have occurred..." should allow consideration of the 1988 DFS "Report", because very important elements of Petitioner's Civil Rights complaint did not exist or had not occurred on or about September 2, 1986, appellate court said, in affirmation of US district court, was the beginning of the period of limitation.

Further, that phrase should allow, in a continuing course of defendants' misconduct, a beginning with the latest incident, or

injury, and that would extend to include the elements referenced in the DFS "Report", Supra.

The phrase in 27-2-102(1)(a), "...the right to maintain an action on the claim or cause is complete..." should allow a person to first become knowledgeable and then pursue a Civil Rights action in US district court when enough elements are together to be potentially prosecutable and sustainable.

> "Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action." With cites. "Applying this principle, we have held that a cause of action does not accrue at the time plaintiff becomes aware of a wrong if, at that time, the plaintiff's damages are not certain to occur or too speculative to be proven." With cites. Acri v. International Ass'n of Machinists, 781 F2 1393, 1396 (1986 CA9).

That should allow, in this case, knowledge by Petitioner of the full text and meaning of the September 2, 1986 state district court "Order" yet accrual would began with failures to fulfill duties of defendants imposed by that "Order" and the "Stipulation" the "Order" was legally based on and to provable injuries sustained then by Petitioner to his Civil Rights.

It should allow a decision to be made by Petitioner as to if an action could be sustainable and not frivolous for lack of significant key elements, the objective threshold test. Petitioner could not have pursued his Civil Rights Complaint until enough significant key elements were known by him, especially those elements described in the DFS "Report". Matter of equitable tolling doctrine should therefore apply tolling the limitation to at least include discovery of the DFS "Report", if not, then the Phillips "Statement" (1987).

D.

Grey, supra, does allow tolling pending discovery of the cause of injury and so does 27-2-102(3) in a setting of 27-2-102 read in toto.

However, the 9th circuit in very recent Civil Rights cases is tending towards acceptance of state statutes of limitations as totally controlling, regardless of what is said the statutes say, avoiding a review of a federal question of when to start.

> "Washington Supreme Court interpretations of Washington law are binding on Court of Appeals unless Court of Appeals determines such interpretation to be untenable or veiled attempt to avoid review of federal questions." Powell v. Ducharme 998 F2 710, 713 (1993 CA9 Wash). Citing Oxborrow v. Eikenberry, 877 F2 1395, 1399 (1989 CA9), cert den 493 US 942.

And lack of knowledge is part of the larger federal question of when to start, in terms of concealment.

Petitioner finds it necessary to point out, Montana's statutes of limitations are not geared to a complex set of case parameters such as is evidenced by examination of this case and a complete examination of *Bennett* in a setting of *Grey* shows discovery is a factor to contend with in this cause as a result of a lack of knowledge in terms of concealment. Furthermore the 11th Circuit and the 9th differ on the matter of tolling. Compare, *Anixter, supra* with *Powell, supra*.

Nonetheless, a reading of 27-2-102, in toto, with fair emphasis on 27-2-102(3) which gives an alternative to lack of knowledge, results in a similar reading of *Briley, Supra* at 855:

> "...the statutory period does not begin to run until discovery of the injury..."

If we were to read only that part of 27-2-102(2), the 2nd sentence, see App. p11:

> "Lack of knowledge of the claim or cause of action, or its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation",

as the only possible beginning of the limitation, which conflicts with full text of paragraph 27-2-102(3) and its subparagraphs, then Montana and California would conflict on specifications of when to begin the period of limitation as under *Briley, Supra.*, and, a conflict with federal law as to equitable tolling. Thus a federal question has arisen in this case as to national standards of application of tolling pending discovery in terms of concealment.

E.

Montana's tort statutes of limitation are subject to federal interpretation of interrelationships based on circumstances of this complex case.

Is it discriminatory to toll pending discovery for one class of tort and not another, especially in terms of concealment? This case was not granted tolling pending discovery with or without terms of concealment; Petitioner has and is saying it is error.

Tolling pending discovery, especially in terms of concealment, should always be allowed in all cases of Civil Rights at least if the undiscovered injury involves a "crime against humanity" as is the case here. This principle would be in conformity to western Hemispheric international common law, published in cases from the Inter-American Court of Human Rights, an arm of the OAS based in San Jose, Costa Rica.

F.

Certain violations to Petitioner's Civil Rights then having taken place prior to 1986 were not "discovered", under concealment, until later in the Phillips "Statement", App. "G", followed 5 months later

(by more discovery masked thru concealment) in the DFS "Report", App. "F", both well within the 3 years statute of limitations.

Petitioner was not aware at the time of their happening, his child was threatened with a loaded gun by the first foster care father so to keep her mouth shut; she witnessed a near murder; suffered anguish, pain, injury, abuse, and neglect while in the first foster care home long before April 6, 1987. Most of these first foster care harmful events were attested to much later in the Phillips "Statement". See App. "G".

G.

Even if discovery, or concealment, is not enough to show when to begin to run a statute of limitations, consider this:

> ".....(the) period.....begins to run on date the cause of action 'accrues' which is date that damage is sustained and not date when causes are set in motion which ultimately produce injury." City of Philadelphia v. Lieberman, 112 F2 424, 428 (1940 CA3), Cert Den 311 US 679. ins add

"It is a rule of general application that a cause of action accrues for limitation purposes only when it could be prosecuted to a successful conclusion." With cites[8]

Argument as to Question 3

Whether Petitioner could rely upon an exception, contained in state's tort statute of limitations, that of torts founded upon instruments in writing having a longer limitation period?

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8 Kucera v. Metropolitan Life Insurance Co., 719 F2 678 (1983 CA3) citing US v. Wurts, 303 US 414, 418; Grayson v. Harris, 279 US 300, 304-05; Baron v. United Artists, 717 F2 105, 108 (1983 CA3); City of Philadelphia v. Lieberman, supra. Baron at p108 referenced Holmberg v. Armbrecht, 327 US 392, 395-97 (1946); which came from 150 F2 829 (1945 CA2).

A.

The application of a state tort statute of limitations to this case in US district court should have included consideration for a tort founded upon an instrument in writing. The September 2, 1986 "Order" of state district court, App. 49, par. 3, relied on the "Stipulation", App. "J", an instrument in writing, as a legal bases for its issuance.

> "....A "Stipulation" is an instrument taken by order of the court. Its terms are determined by the will of the court, and not by that of the parties." "Consequently it is to be interpreted by the intention of the court only as to the nature and intent of its obligation." Lewis v. Orpheus, 15 Fed. Cas. 492, 493. Also see People ex rel. v. Spring Lake Drainage and Levee Dist. 97 NE 1042, 1047; Burke v. Gale, 67 SE2 917, 920 (1951 Va).

Petitioner was entitled to relief when he sustained damage from failure to implement the obligation for court ordered regular visitation:

> "Generally, a party injured by a breach of an obligation imposed by law or agreement is entitled to compensatory relief." In Re Monetary Group, 2 F3 1098, 1104 (1993 CA11).

Obligation for regular visitation was founded on "instrument in writing", the "Stipulation" put in place by will of state court.

> "Subcontractor's cross claim against steel manufacturer to recover damages it might be obligated to pay to contractor on account of failure of manufacturer to comply with terms of order requiring that materials meet federal specifications was one founded upon an 'instrument in writing' within statute limiting commencement of action founded on instrument in writing to 4 years, and was not barred by 2 year statute of limitations for bringing actions not founded on written instruments." Nomellini Const. Co. v. Harris, 77 Cal.Rptr. 361, 365, 272 C.A.2d 352. Also see El Ranco, Inc. v. New York Meat and Provision Co., 493 P2 1318, 1321 (1972 Nev.).

B.

At App. 12, an action sounding in tort founded on an instrument in writing the limit is 8 (eight) years not 3. 8 years would include mid-1985 when the "Stipulation" was written. The phraseology in 27-2-102(2) should allow 27-2-204 to be placed in a setting of 27-2-202 as the September 2, 1986 "Order" was legally based upon a "Stipulation", an "instrument in writing", such as mentioned in 202.

From 27-2-204: ".....commencement of an action.....not founded upon an instrument in writing is within 3 years."

From 27-2-202: ".....commencement of an action.....founded upon an instrument in writing is within 8 years."

Argument as to Question 4.

Whether in a series of Civil Rights injury inflictions, federal courts may characterize certain inflictions for accrual purposes negating other later inflictions which could best met the objective threshold test?

A.

Standards tests to be met were elaborated in Petitioner's briefs filed at appellate level:

1) Contents of DFS "Report" and the September 1986 "Order" clearly established standing of Petitioner. He retained Rights.

2) The discovery of DFS "Report" was timely within 3 year state tort statute of limitations. As was the Phillips "Statement".

3) Following the "Order", at about the time of discovery of the Phillips "Statement", September 1987 and the DFS" Report", March 1988, injury to Petitioner's Rights had then become significant, sufficient, and met the objective threshold test. Petitioner did meet those standards tests and this case should have proceeded to trial.

B.

Civil Rights are one or more Rights created by or recognized by federal law and the US Constitution. To single out any particular one from amongst many and say if a violation of it occurred many years ago that formed accrual for all other Rights offenses occurring everafter, rejects as valid complaint any other Rights being violated at a later time. Clearly, the international community would not tolerate such an outrageous violation of Human Rights!

Petitioner claims the State and its actors committed crimes against humanity after the date of the accrual said to have occurred by US district court and in affirmation by the court of appeals. That negated the federal question of when in a series of inflictions to begin accrual based upon a complete picture of all inflictions not just a single one picked out of all others as a matter of discretion. The essential element of proof for that picking was missing, as shown above. Otherwise, that places a premium on simplistic procedures over substance and forces forgiveness for all violations occurring after initializing accrual.

In order for vindication of Petitioner's Civil Rights to occur, the violations must **all** be given individual attention examining each and every violation of each and every Right, in light of origin of each Right, thruout the period of complaint to decide accrual (taking into account discovery, concealment, equitable tolling, instruments in writing, and other parameters) based upon a proper examination of the state tort statutes of limitation. This places the suit in proper context as to procedural and substantive due process, which was not granted in this case.

C.

Consider this, as recent as May of 1993, the ninth circuit said:

"Montana recognizes,.....(theory) of "continuing nuisance/ **continuing injury is that each new act gives rise to a separate cause of action and the statute of limitations is tolled until the source of the injury is abated."** Montana Pole & Treating Plant v. I.F. Laucks & Co., 993 F2 676, 679 (1993 CA9). ins and emp add

Argument to Question 5.

Whether DFS discriminated applying a "Service Treatment Agreement" to foster care alleged perpetrator instead of to Petitioner.

A.

In the DFS "Report was discovered the foster care **"SERVICE TREATMENT AGREEMENT** of January 29, 1988. The "STA" was an instrument in writing. See App. "F", App. 35-36. It compounded proof of allegations against defendants and was US district court and court of appeals suppressed along with all the rest of the DFS "Report". That "STA" was bad faith. It unconstitutionally excluded Petitioner's due process and equal protection Rights. It formed, in part, the bases for Petitioner's Civil Rights action to establish liability as regards that instrument violating Petitioner's Civil Rights. That was the 2nd written instrument to play a part in this case.

B.

The September 1986 "Order" called for temporary care and custody in the State, legally based upon the "Stipulation", the 1st instrument, and performance was to be carried out in good faith, one could presume. If any other arrangements, such as an STA and termination of regular visitation, were to take place after that 1986

"Order", further due process would have had to be provided to Petitioner (which it was not) because, he was not devoid of his Rights and privileges by that "Order". That foster care "STA" and failure of further due process violated the 14th Amendment the Civil Rights Act was intended to preserve.

C.

The engagement of that foster care "STA" was a wrongful act because a real family STA, it must be noted, was intended by Congress in USC 42-601, et seq. to bring back together a real family. That foster care "STA" was outrageous unconstitutional government conduct where the foster care father having committed a "crime against humanity" upon his charge went unpunished because of that "STA" and other interference. That "STA" denied, under color of state law, a privilege to Petitioner's real family that which was granted instead to a foster care family, App. p13-14, at 675 (1) in conjunction with (5)(A), App. p14. That, defies the 14th Amendment, Section 1:

> ".....No state shall make or enforce any law which shall abridge the **privileges** or immunities of citizens of the United States....." (emp add)

Thus, Petitioner was discriminated against in favor of the foster care perpetrator of abuse and neglect violative of Title VI of the Civil Rights Act of 1964. "Title VI's ban on discrimination in federally assisted programs was tied to the constitutional provision, Congress's TAXING AND SPENDING POWER." *Encyclopedia of the American Constitution*, Vol. 1 1986, at p285.

D.

USC 42-675(6), App. p15, recognized certain privileges of real parents which was denied to Petitioner under color of state law. In

like fashion to above, as count 2 of discrimination, that federal statute recognized as a privilege a foster care review committee examining the status of a given state case being open to the real parents. The state statute, MCA 41-3-1115(1)(f), instead grants the privilege to a foster care provider. These federally created privileges being strictly a federal question, accrual of infraction ought not be strictly a matter of state statute controlling but of federal law controlling, considering discovery played the critical role. Explained further in *Briley v. State of California, supra.* Few if any provisions of USC 42-601, et seq., have been followed by the State and its actors; in Montana and most other states since inception of the Child Welfare Act of 1980. Petitioner intended to bring this matter of discrimination to the attention of the federal courts on a strictly federal question which could not be resolved no other way in Montana. Apparently, it was not enough.

> "Relief that serves to bring end to present violation of federal law is not barred by the 11th Amendment....." Papason v. Allain, 478 US 265 (1986).

CONCLUSION

For all of the above reasons, dismissals and judgments having taken place in this case should be vacated and this case should be remanded as for a new trial to include all defendants dismissed or granted summary judgment.

Respectfully submitted,

Frank Boring Fitzgerald

Frank Boring Fitzgerald, Pro Se

Dated: January 24, 1994

Appendices follow in separate volume

AFFIDAVIT

STATE OF MONTANA)
) ss:
County of Yellowstone)

FRANK BORING FITZGERALD, being first duly sworn, hereby deposes and says:

He has personally prepared and read his PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT;

He certifies, in his judgment it is well founded.

Frank Boring Fitzgerald

Frank Boring Fitzgerald, Pro Se

SUBSCRIBED AND SWORN TO before me by Frank Boring Fitzgerald on this 24th day of January, 1994.

Dana F. Song

Dana F. Song

NOTARY SEAL

Notary Public in State of Montana
Residing in Billings, Montana
My Commission Expires: Oct. 4th 1994

CERTIFICATE OF SERVICE

I, Frank Boring Fitzgerald, Pro Se, hereby certify service of the forgoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was made on January 26, 1994, by placing 3 true and correct copies of same in the United States mail, postage prepaid, and addressed to each of the following Attorneys of record, and persons known to have an interest in this PETITION, at their last known addresses:

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